MCP INTERNATIONAL CORP & ANOR
v. SIMS METAL BV; MAERSK A/S (INTERVENER)

HIGH COURT MALAYA, SHAH ALAM
ELAINE YAP CHIN GAIK JC
[GUAMAN NO: BA-22NCvC-57-02-2023]
12 DECEMBER 2024

Abstract – *(i) A third party may intervene to set aside or vary the injunction, or just to seek the enforcement of an express or implied undertaking by the plaintiff to indemnify it for doing what an injunction impliedly required of it. The fact that an ex parte order had lapsed before it was filed should only go to the question of quantification of any recoverable damages; (ii) Where an ex parte order is granted to freeze, detain and preserve as well as take samples from a certain cargo, and it is found that ownership of the cargo is disputed, and that the detained cargo is not, in fact, the subject matter of the action and are simply assets sought to be secured to satisfy a prospective judgment in an action by preventing them from being removed from the jurisdiction, there is no basis in such situation, to invoke O. 29 rr. 2 and 3 of the Rules of Court 2012 to obtain the ex parte order. Certain standards need to be met when moving the court for ex parte interim injunctions, especially when third party rights may be adversely affected.*

CIVIL PROCEDURE: *Setting aside – Ex parte order – Application for – Ex parte order granted to freeze, detain, preserve and take samples from cargo – Whether ex parte order lapsed without prior challenge – Whether Mareva injunction in ex parte order purported to freeze assets that did not belong to defendant – Whether ownership of cargo disputable – Whether containers under shipment within jurisdiction – Whether cargo identified in ex parte order unrelated to dispute in action – Whether ex parte order liable to be set aside*

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SHIPPING: *Cargo – Ex-parte order – Ex parte order to freeze, detain, preserve and take samples from cargo – Application to set aside ex parte order – Whether ex parte order lapsed without prior challenge – Whether Mareva injunction in ex parte order purported to freeze assets that did not belong to defendant – Whether ownership of*

cargo identified in ex parte order disputable – Whether containers under shipment within jurisdiction – Whether cargo identified in ex parte order unrelated to dispute in action – Whether ex parte order liable to be set aside

The plaintiffs filed an action and moved the court for urgent *ex parte* orders to freeze, detain and preserve as well as take samples from certain cargo entering into Malaysia on the 'Ever Gentle,' a container ship operated by Maersk A/S ('Maersk'). The application for the *ex parte* order was filed in aid of the plaintiffs' suit against the defendant for breach of a sales contract under which the defendant was to have supplied 350 metric tonnes of zinc-aluminium alloy scrap for USD623,000 to the first plaintiff, who was the second plaintiff's procurement agent. The allegation was that the defendant had shipped scrap metal and not the goods purchased by the plaintiffs. The plaintiffs pleaded that they had a good case to recover damages from the defendant and because the defendant was a Belgium entity with no other assets in the jurisdiction, there was a risk that the cargo identified in the *ex parte* order would leave the jurisdiction on the defendant's order to frustrate any judgment. The *ex parte* orders were granted ('*ex parte* order'). The cargo in question included 23 containers under Maersk Bills of Lading Nos MAUE223194170 and MAEU222894685 ('disputed B/Ls'). The 23 containers which were the subject of the *ex parte* order ('detained cargo') were also said to be assets belonging to the defendant. Maersk applied to intervene in this action and the order was granted. As an intervener, Maersk filed the present application *vide* encl. 48 to set aside the *ex parte* order and claim RM384,878.38 as damages from the plaintiffs as a result of its compliance with the *ex parte* order. The issues that arose for determination were, *inter alia,* (i) whether the *ex parte* order that had lapsed without prior challenge was liable to be set aside by Maersk; (ii) whether the *Mareva* injunction in the *ex parte* order should be set aside because it purported to freeze assets that did not belong to the defendant; (iii) whether the *Mareva* injunction in the *ex parte* order should be set aside because the containers were not within the jurisdiction of this court ('overseas cargo'); and (iv) whether the other prayers for detention, preservation and sampling of the cargo identified in the *ex parte* order should be set aside because they were not the subject matter of the underlying action.

Held (setting aside *ex parte* order; allowing order for assessment of damages):

(1) An application to set aside an *ex parte* interim injunction can still be entertained even after it had lapsed. The purpose of such an application is to determine if the *ex parte* interim injunction should have been granted at all. Further, a party served with notice of such an order arrives on the scene at a significant disadvantage. He should not be deemed to have accepted that the *ex parte* interim injunction was properly taken out by reason only of a delayed reaction. (paras 14-17)

(2) A third party may intervene to set aside or vary the injunction, just to seek the enforcement of an express or implied undertaking by the plaintiff to indemnify it for doing what an injunction implied required of it. Distinguishing the nature of the undertaking applicable to third parties, it would seem that all of these options were available to third parties depending on the circumstances, even if there was no application or order made to vary or discharge the *ex parte* injunction. (para 22)

(3) In this case, Maersk was served with the *ex parte* order on 20 February 2023 and based on the timelines provided, had already discharged the cargo in Port Klang on 2 February 2023. It presumably undertook inquiries into the claims of fraud and ownership of the cargo identified in the *ex parte* order and applied to intervene on 4 February 2023 with an affidavit that raised the complaints concerning the validity of the *ex parte* order, not knowing that it had lapsed on 9 March 2023. The period that elapsed between 20 February 2023 and when Maersk first formally expressed its objection to the *ex parte* order on 4 February 2023 was not so inordinate as to infer Maersk's acceptance of its validity. Thus, encl. 48 was properly brought before the court for consideration. (paras 23-26)

(4) On reviewing the disputed B/Ls, they were specifically consigned to named consignees and it was not apparent that the disputed B/Ls were made to the order of the defendant or that the defendant reserved the right of disposal. Maersk took the position that it was unable to ascertain the lawful owner of the detained cargo. Based on first principles, a bill of lading is a symbol of the goods represented by it, and evidences possession, not property. Where the bill of lading was transferred to the buyer, the property passes, strictly speaking, by the contract and not by the transfer of the bill. Without sale contracts or any endorsement on the disputed B/Ls that they were made to the order of the defendant to raise a presumption of reservation of title/right of disposal according to s. 25(2) of the Sale of Goods Act 1957, it was fair to say that ownership of the cargo identified in the *ex parte* order was disputable on the face of the documents when the *ex parte* order was sought. The plaintiffs had thus overstated its case for a *Mareva* injunction. (paras 34-46)

(5) The plaintiffs had presumed the fact of ownership of all the cargo identified in the *ex parte* order as the defendant's without drawing the court's attention to the speculative basis for that presumption. In so doing, the plaintiffs failed to make full and frank disclosure to the court that bills of lading were inconclusive and there may be multiple ownership claims to the cargo in question. The plaintiffs' own experience with the defendant under the contracts in dispute in this action did not prove the *modus operandi* of the defendant of pretending

A to ship cargo with no intention to transfer property in it to defraud buyers. The *Mareva* injunction in the *ex parte* order was wrongly granted on the premise of a presumption that was not called to the court's attention. (paras 46-48)

B **(6)** The detained cargo was not, in fact, the subject matter of the action against the defendant. The plaintiffs' claim was for breach of sale contracts relating to cargo in ten containers shipped on the same vessel. Thus, the cargo identified in the *ex parte* order was unrelated to the sale contracts under dispute in this action. They were simply assets sought by the plaintiffs to be secured to satisfy a prospective judgment in this C action, by preventing them from being removed from the jurisdiction. As such, there was no proper basis to invoke O. 29 rr. 2 and 3 of the Rules of Court 2012 to obtain the *ex parte* order. The *ex parte* order should not have been granted in the first place. Thus, the *ex parte* order was set aside and an order for assessment of damages suffered by Maersk D by reason of the *ex parte* order was allowed. (paras 52-58)

Case(s) referred to:

Clipper Maritime Co Ltd v. Mineralimportexport The Maxie Leonhardt [1981] 3 All ER 664 ***(refd)***

Creative Furnishing Sdn Bhd v. Wong Koi [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22 SC ***(refd)***

E *Elias Mooin & Anor v. Dato' Zainal Abidin Johari [1997] 3 CLJ 455 HC* ***(refd)***

Galaxia Maritime SA v. Mineral Importexport; The Eleftherios [1982] 1 All ER 796 ***(refd)***

Golden Star & Ors v. Ling Peek Hoe & Anor And Another Appeal [2024] 6 CLJ 487 FC ***(refd)***

Metrowangsa Asset Management Sdn Bhd & Anor v. Ahmad Hj Hassan & Ors [2004] CLJU 699; [2004] 1 LNS 699 HC ***(refd)***

F *Middy Industries Sdn Bhd & Ors v. Arensi-Marley (M) Sdn Bhd [2012] CLJU 830; [2012] 1 LNS 830 CA* ***(refd)***

Pemunya Kargo Atas Kapal 'Istana VI' v. Pemilik Kapal Atau Vesel 'Filma Satu' Dari Pelabuhan Jakarta Indonesia & Other Actions [2010] CLJU 804; [2010] 1 LNS 804 HC ***(refd)***

G *Project Development Co Ltd SA v. KMK Securities Ltd [1983] 1 All ER 465* ***(refd)***

RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd [2002] 3 CLJ 83 CA ***(refd)***

Searose Ltd v. Seatrain (UK) Ltd [1981] 1 All ER 806 ***(refd)***

Sewell v. Burdick (1884) 10 App Cas 74 ***(refd)***

Z Ltd v. A-Z and AA-LL [1982] QB 558 ***(refd)***

H **Legislation referred to:**

Rules of Court 2012, O. 29 rr. 2, 3, O. 59 r. 16(4)

Sale of Goods Act 1957, s. 25(2)

For the plaintiff - Yee Jun Hong, M/s JH Yee & Co

For the intervener - Jeremy Mark Joseph Jayaraj S & Caleb Goh, M/s Joseph & Partners

I *Reported by Suhainah Wahiduddin*

JUDGMENT

Elaine Yap Chin Gaik JC:

Introduction

[1] The plaintiffs filed this action and moved the court for urgent *ex parte* orders on 10 February 2023 to freeze, detain and preserve as well as take samples from certain cargo entering into Malaysia on the "Ever Gentle" a container ship operated by Maersk A/S ("Maersk"). The *ex parte* orders were granted on 16 February 2023 ("*ex parte* order").

[2] The cargo in question included 23 containers under Maersk Bills of Lading Nos. MAEU223194170 and MAEU222894685 ("disputed B/Ls"). The 23 containers which were the subject of the *ex parte* order ("detained cargo") were said to be assets belonging to the defendant.

[3] Maersk applied to intervene in this action on 4 April 2023 and the order was granted on 19 September 2023. It also applied *vide* the same application in encl. 29 for various other orders which were not all pursued at the time.

[4] *Vide* encl. 48 filed on 3 October 2023, Maersk now seeks to set aside the *ex parte* order and claim RM384,878.38 as damages from the plaintiffs as a result of its compliance with the *ex parte* order.

Background Facts

[5] The application for the *ex parte* order was filed in aid of the plaintiffs' suit against the defendant for breach of a sales contract under which the defendant was to have supplied 350 metric tonnes of zinc-aluminium alloy scrap for USD623,000 to the first plaintiff. The first plaintiff was the second plaintiff's procurement agent.

[6] The allegation is that the defendant had shipped scrap metal and not the goods purchased by the plaintiffs. It suffices for the purpose of this application, to note that the plaintiffs considered the defendant a fraudster. In support of their application for the *ex parte* order, the plaintiffs alleged that the defendant had a *modus operandi* of shipping cargo and changing the consignee when the containers were in transit to deceive genuine buyers.

[7] No one has been able to contact the defendant and it has not appeared in this action. On that basis, the plaintiffs pleaded that they had a good case to recover damages from the defendant and because the defendant is a Belgium entity with no other assets in the jurisdiction, there was a risk that the cargo identified in the *ex parte* order would leave the jurisdiction on the defendant's order to frustrate any judgment.

[8] The plaintiffs were granted the *ex parte* order in the following terms:

1. Suatu Perintah Injuksi *Mareva* dimasukkan terhadap Defendan dan untuk menghalang Defendan untuk samada dengan sendirinya ataupun melalui ejennya, pekerjanya dan/atau wakilnya untuk berurusan (dealing), menyerahhak (assigning), mengeluarkan (removing), melupuskan (disposing) dan/atau memindahkan (transferring) apa-apa aset kepunyaan Defendan termasuk dan tidak terhad kepada penghantaran perkapalan dan kargo-kargo seperti berikut kepada mana-mana pihak sehingga pelupusan tindakan ini:

No. No Serial Penghantaran (Shipment No) dan Kargo No

Karoo No. dalam No Serial Penghantaran (Shipment No) 223194170

1. MRKU6867760
2. MRKU7145340
3. MRKU7516S90
4. MRKU9329304
5. MRKU9867531
6. MRSU0041500
7. MSKU4245624
8. MSKU 5677089
9. MSKU 7998262
10. PONU0073872

Karoo No dalam No Serial Penghantaran (Shipment No) 222894685

11. MRKU6715807
12. MRKU7245483
13. MRKU8S53243
14. MRKU8696080
15. MSKU3528553
16. MSKU3849276
17. MSKU4113839
18. MSKU4179902
19. MSKU7945473
20. SUDU1552214

21. SUDU7472008

22. TEMU5489245

23. TGKU1640761

Kargo No dalam No Serial Penghantaran (Shipment No) 224161401

24 TRHU1276435

Kargo No dalam No Serial Penghantaran (Shipment No) 224275340

25. MSKU4107693

26. MSKU7592714

Kargo No dalam No Serial Penghantaran (Shipment No) 22742135

27. BMOU 1416490

28. BSIU 2844327

29. BSIU 3231778

30. CXDU 1440854

Kargo No dalam No Serial Penghantaran (Shipment No) 223785243

31. MRKU7725369

32. MRKU9331410

("Kargo-kargo tersebut")

2. Suatu Perintah untuk menahan (detention) supaya memelihara (preservation) Kargo-kargo tersebut yang merupakan hal perkara kausa sehingga pelupusan tindakan ini;

3. Suatu perintah lanjut bahawa akses diberi kepada Plaintif-Plaintif kepada kargo-kargo tersebut supaya sampel diambil supaya permerhatian dibuat dan ujikaji dicuba ke atas barang-barang dan/atau bahan-bahan yang terkandung dalam Kargo-kargo tersebut;

[9] No *inter partes* hearing was ever held and the *ex parte* order lapsed after 21 days, *ie*, on 9 Mac 2023. In the meantime, Maersk was served and notified of the *ex parte* order on 20 February 2023 with the following cautionary remarks about the need to comply with the order:

4. We understand that you may have obligations to the consignor regarding the delivery of the cargoes. However, we would like to bring to your attention that failure to comply with the Court Order may result in legal consequences, and our Clients may seek further legal action if necessary.

There is no response on record in reply to the query from Maersk's local solicitors in response to that letter, inquiring about the *inter partes* hearing.

Analysis And Findings

[10] As an intervener, Maersk filed the present application in encl. 48 to set aside the *ex parte* order and claim damages. The issues that arose for determination under encl. 48 are as follows:

Setting Aside An Expired *Ex Parte* Order

(i) whether the *ex parte* order that had lapsed without prior challenge, is liable to be set aside by Maersk

Grounds For Setting Aside the *Ex-Parte* Order

(ii) whether the *Mareva* injunction in the *ex parte* order should be set aside because it purported to freeze assets that do not belong to the defendant;

(iii) whether the *Mareva* injunction in the *ex parte* order should be set aside because the containers under Shipment Nos: 224161401, 224275340 and 223785243 were not within the jurisdiction of this court ("overseas cargo");

(iv) whether the other prayers for detention, preservation and sampling of the cargo identified in the *ex parte* order should be set aside because they are not the subject matter of the underlying action; and

Assessment Of Damages

(v) whether Maersk is entitled to recovery of storage charges, inspection/survey costs to ascertain the contents of the detained cargo and legal fees incurred from 16 February 2023 to 3 May 2023.

Setting Aside An Expired *Ex Parte* Order

[11] The plaintiffs argued that Maersk is not entitled to apply to set aside the *ex parte* order to claim damages at all, because the said order had lapsed automatically on 9 March 2023 without any prior challenge. According to the plaintiffs, Maersk's failure to apply to set aside or discharge the *ex parte* order before it lapsed meant that it had accepted the validity of the *ex parte* order.

[12] The plaintiffs relied on *Elias Mooin & Anor v. Dato' Zainal Abidin Johari* [1997] 3 CLJ 455; [1997] 5 MLJ 359 ('*Elias Mooin*'). In that case, the defendant claimed that since the *ex parte* injunction had lapsed and an application to extend it had been refused, they were entitled to damages on the plaintiff's undertaking. The argument failed because the court held that since the *ex parte* injunction was not sooner revoked or set aside before it lapsed, the defendant "must have accepted that this *ex parte* interim injunction was properly taken out."

[13] A similar issue was addressed by the Court of Appeal in *Middy Industries Sdn Bhd & Ors v. Arensi-Marley (M) Sdn Bhd* [2012] CLJU 830; [2012] 1 LNS 830; [2013] 3 MLJ 511 ("*Middy Industries*"). There, the High Court had struck out a notice of appointment to assess damages because (i) a discharge of the *ex parte* injunction and (ii) a consequential order of the court that damages be assessed, are both preconditions for any assessment of damages on the plaintiff's undertaking. The Court of Appeal agreed:

> [13] The form of undertaking indicates that the court has discretion whether to enforce it at all and that discretion is not limited in any way. The undertaking is given to the court and not to the respondent. The respondent can ask the court to enforce it but has no right to its enforcement or any right to damages until the discretion is exercised in his favour and damages are awarded by the court (see *Cheltenham and Gloucester Building Society v. Ricketts and others* [1993] 4 All ER 276).

[14] The Court of Appeal in *Middy Industries* also agreed with *RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd* [2002] 3 CLJ 83 which held as follows:

> If the defendant wants to set aside the *ex parte* order, the defendant is at liberty to file an application for that purpose. It is at the hearing of that application that the court should decide whether to set it aside, if it has not lapsed. If in the meantime, the *ex parte* order has lapsed, the court should nonetheless hear the application, not for the purpose of determining whether to set it aside because it has lapsed, but for the purpose of determining whether it should have been made in the first place. This is necessary in order to determine whether damages should be awarded. The fact that an *ex parte* order lapses automatically after 21 days does not mean that the defendant is automatically entitled to damages. The question is should the *ex parte* order have been made at all? Only if it should not, then the order for assessment of damages should be made. That has not been decided. There was not even an application or that purpose.

It was thus held in *Middy Industries* that an application to set aside an *ex parte* interim injunction can still be entertained even after it has lapsed.

[15] This court takes the view that neither *Elias Mooin* nor *Middy Industries* are an authority for the proposition that an application to set aside an *ex parte* interim injunction made after it lapses is automatically non-viable. In both of those cases, no such application was filed at all.

[16] An inordinate delay in applying may be relevant in the exercise of the court's discretion not to order an assessment of damages, but I agree with counsel for Maersk that there is no reason in principle why an application to set aside an *ex parte* interim injunction cannot be made after the order has lapsed.

[17] After all, the purpose of such an application is to determine if the *ex parte* interim injunction should have been granted at all. Further, a party served with notice of such an order arrives on the scene at a significant disadvantage. He should not be deemed to have accepted that the *ex parte* interim injunction was properly taken out by reason only of a delayed reaction.

[18] It should also be noted that both *Elias Mooin* and *Middy Industries* concerned claims for damage based on the undertaking given in the usual manner by the plaintiffs for any damage suffered by the defendants. The position of an innocent third party cannot be equated with that of the defendant. As it relates to a third party, there may be additional impediments beyond its control. For example, the order allowing Maersk to intervene was only made on 19 September 2023, even though the application to intervene was filed on 4 April 2023.

[19] Although this is not a point contested by the plaintiffs, it is instructive to highlight the legal basis for a claim by a third party affected by an *ex parte* interim injunction, which is the context of this case. In *Searose Ltd v. Seatrain (UK) Ltd* [1981] 1 All ER 806 ("*Searose*"), Goff J granted a *Mareva* injunction. However, he did so only upon the condition that an express undertaking is given to pay reasonable costs to that third-party bank who will be put to expense to undertake the exercise of identifying the assets to be frozen because the injunction sought did not specify whether or not any assets to which the order applied were in the possession or control of the third party bank.

[20] The reason for the imposition of the requirement for an express undertaking to the third party was explained. Third parties are required to comply with injunctions under the pain of committal "to assist or support the course of justice." Thus, they should be indemnified if they are put to expense for doing just that. See also *Clipper Maritime Co Ltd v. Mineralimportexport The Maxie Leonhardt* [1981] 3 All ER 664 relating to port authorities affected by Mareva injunctions.

[21] Unlike *Searose* and other cases from that era, there is no express undertaking in the *ex parte* order or in the affidavit by the plaintiffs to pay damages to Maersk as the third party affected by notice of the *ex parte* order. However, the law has developed further and it is now recognised that there should be an implied promise or undertaking by the plaintiff directed to and enforceable by the third party as the circumstances require. Per Lord Denning MR in *Z Ltd v. A-Z and AA-LL* [1982] QB 558:

> In so far as the bank, or other innocent third party, is asked to take any action – or the circumstances require him to take any action – and he is put to expense on that account, he is entitled to be recouped by the plaintiff: and in so far as he is exposed to any liability, he is entitled to

be indemnified by the plaintiff. This is because when the plaintiff gives notice of the injunction to the bank or innocent third party, he impliedly requests them to freeze the account or otherwise do whatever is necessary or reasonable to secure the observance of the injunction. This implied request gives rise to an implied promise to recoup any expense and to indemnify against any liability.

[22] Based on the above, a third party may intervene to set aside or vary the injunction, or just to seek the enforcement of an express or implied undertaking by the plaintiff to indemnify it for doing what an injunction impliedly required of it. Distinguishing the nature of the undertaking applicable to third parties, it would seem that all of these options are available to third parties depending on the circumstances, even if there is no application or order made to vary or discharge the *ex parte* injunction.

[23] In this case, Maersk was served with the *ex parte* order on 20 February 2023 and based on the timelines provided, had already discharged the cargo in Port Klang on 2 February 2023. It presumably undertook inquiries into the claims of fraud and ownership of the cargo identified in the *ex parte* order and applied to intervene on 4 April 2023 with an affidavit that raised the complaints concerning the validity of the *ex parte* order, not knowing that it had lapsed on 9 March 2023.

[24] The period that elapsed between 20 February 2023 and when Maersk first formally expressed its objection to the *ex parte* order on 4 April 2023 is not so inordinate as to infer Maersk's acceptance of its validity. According to Maersk, it only became aware through its solicitors on 6 April 2023 that the *ex parte* order had lapsed. No evidence contradicts this assertion.

[25] Though it was submitted that Maersk could have discovered the status of the *ex parte* order as soon as local solicitors were on board, this court is of the view that it lies ill in the mouth of the plaintiffs to make this argument as the plaintiffs were no doubt very interested to find out if the contents of the cargo were of value.

[26] Thus, this court finds that encl. 48 is properly before the court for consideration. The fact that the *ex parte* order had lapsed before it was filed should only go to the question of quantification of any recoverable damages.

Grounds For Setting Aside The Ex Parte Order

Ownership Of The Detained Cargo

[27] To obtain the *Mareva* injunction in para. (1) of the *ex parte* order, the plaintiffs must have satisfied the court firstly that it had a good arguable case; secondly that the defendant had assets within the jurisdiction and thirdly, that there was a real risk of the assets being dissipated or removed before judgment.

[28] The thrust of Maersk's case against the *Mareva* injunction in the *ex parte* order is that the elements to be proved by the plaintiffs for such an order to be granted were not met by the plaintiffs, in that the detained cargo were not assets belonging to the defendant.

[29] During the *ex parte* hearing for the *ex parte* order, the plaintiffs had based their assertion that the detained cargo belonged to the defendant on the fact that the defendant's name appears on the disputed B/Ls as the shipper/seller.

[30] In response to the challenge made by Maersk, the plaintiffs further sought to confirm its presumption by the fact that no one else has come forward to claim ownership with the original disputed B/Ls and relied on s. 25 of the Sale of Goods Act 1957 ("SOGA") which provides that:

> (1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract the seller may by the terms of the contract or appropriation reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.
>
> (2) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

[31] The effect of the above provision was explained in *Pemunya Kargo Atas Kapal 'Istana VI' v. Pemilik Kapal Atau Vesel 'Filma Satu' Dari Pelabuhan Jakarta Indonesia & Other Actions* [2010] CLJU 804; [2010] 1 LNS 804; [2011] 7 MLJ 145 ("*Istana VI*"). In that case, the issue arose is whether the plaintiff buyer of cargo on the vessel had *locus standi* to sue the ship owner for tort and other causes resulting from the loss of cargo which had been discharged elsewhere than intended.

[32] In *Istana VI*, the shipper, KPB, retained a right of disposal by issuing the bills of lading 'to order' rather than naming the plaintiff as consignee. The issue of *locus standi* turned on whether property had passed to the plaintiff buyer if the bill of lading was made to the order of the shipper. The court found that s. 25(2) of the SOGA raised a rebuttable presumption that the passing of property is precluded by the seller's reservation of the right of disposal:

> [54] In the instant case the bills of lading were made to the order of the shipper, *ie*, KPB. As such in accordance with s. 25(2), it would appear that the seller, *ie*, KPB has *prima facie*, reserved the right of disposal thereby precluding the passing of property from itself to the buyer plaintiff.

[33] The above is relevant because the plaintiffs contended that the disputed B/Ls in this case were also made to the order of the defendant as shipper and the defendant had reserved the right of disposal, thereby precluding the passing of property from itself to any other party.

[34] On reviewing the disputed B/Ls in this case, this court has noted that they were specifically consigned to named consignees and it is not apparent that the disputed B/Ls were made to the order of the defendant or that the defendant reserved the right of disposal. The consignees for the disputed B/Ls (referred to as Shipment Nos: 223194170 and 222894685 in the *ex parte* order) were identified as Rainbow Metal Recycle Sdn Bhd ("Rainbow Metal") and LLS International Trading Sdn Bhd ("LLS International").

[35] Based on evidence produced through inquiries made by Maersk:

(i) the initial consignees for five of the 23 containers were Taizhou Mingyi Metal Co Ltd ("Taizhou") who had notified Maersk on 1 February 2023 that there was fraud in relation to seven containers shipped by the defendant, the defendant could not be reached and that the shipments had been re-routed to Port Klang, Malaysia;

(ii) a police report was later lodged by LLS International on 15 March 2023 to say that they were unable to contact the defendant and did not have the telex release from Maersk's agent to clear customs. The report was lodged as a precaution in case of claims by Maersk against it for port charges; and

(iii) Rainbow Metal refused to take delivery of the containers consigned to it.

[36] Maersk took the position that Taizhou and LLS International were therefore asserting ownership rights of the five and 13 containers respectively, from among the detained cargo. More generally, Maersk took the position that it was unable to ascertain the lawful owner of the detained cargo.

[37] Maersk came to know later (it is not stated when) that both Rainbow Metal and LLS International were not claiming ownership over the detained cargo. However, it is not clear if they never had ownership rights or if they had simply abandoned the detained cargo.

[38] As it became apparent later on, the detained cargo turned out to be more trouble than they were worth and no one wanted to be saddled with it. In particular, even the plaintiffs who had moved the court for a *Mareva* injunction was not interested in the detained cargo.

[39] Considering all this, was the cargo identified in the *ex parte* order assets of the defendant?

[40] Based on first principles, a bill of lading is a symbol of the goods represented by it, and evidence possession, not property. Where the bill of lading is transferred to the buyer, the property passes, strictly speaking, by the contract and not by the transfer of the bill. This accords with s. 19 of the SOGA:

> (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.
>
> (3) Unless a different intention appears the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

[41] Further, in *Sewell v. Burdick* (1884) 10 App. Cas. 74, the House of Lords held that:

> The indorsement of the bill of lading has no magical effect. By the custom of merchants the indorsement and delivery of the bill of lading is equivalent to the taking possession of the goods; but the property in the goods does not pass unless it is intended by the contract that it shall pass. There is no direct decision that the mere indorsement of a bill of lading passes the whole property in the goods when it is not so intended; and there are decisions inconsistent with such a proposition.

[42] Thus, without the sale contracts or any endorsement on the disputed B/Ls that they were made to the order of the defendant to raise a presumption of reservation of title/right of disposal according to s. 25(2) of the SOGA on the disputed B/Ls, it is fair to say that ownership of the cargo identified in the *ex parte* order was disputable on the face of the documents when the *ex parte* order was sought.

[43] All that being said, the real question to be asked is to what standard the plaintiffs were required to prove the defendant's ownership of the detained cargo as one of the elements of its application for the *Mareva* injunction at the *ex parte* hearing. Even if it was subsequently ascertained that the defendant did not own the detained cargo, this does not necessarily mean that the *ex parte* order was wrongly granted.

[44] The grant of the *ex parte* order was an exercise of discretion by the judge hearing the matter and who would have at the forefront of his mind, whether justice requires the urgent *ex parte* interim injunction to be granted. The discretion is not unfettered and as noted in *Metrowangsa Asset Management Sdn Bhd & Anor v. Ahmad Hj Hassan & Ors* [2004] CLJU 699; [2004] 1 LNS 699; [2005] 1 MLJ 654:

A *Mareva* injunction would be refused if there is no evidence that the particular defendant possesses any removable assets within the jurisdiction (*Rasu Maritama SA v. Perushaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)* [1978] QB 644; [1977] 3 All ER 324 CA). An injunction too will be refused if the value of the assets is nominal and their ownership is in question (*Rasu Maritama SA v. Perushaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)* (*supra*)).

[45] Relying on *Creative Furnishing Sdn Bhd v. Wong Koi* [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22; [1989] 2 MLJ 153 ("*Creative Furnishing*"), Maersk submitted that in this case, the court was misled by the submission that the cargo identified in the *ex parte* order were assets belonging to the defendant. The plaintiffs represented the defendant's ownership of the cargo as a fact and to the extent that it was ventilated, reference to the bills of lading was an incorrect evidential basis for the plaintiffs' assertion. The court held as follows in *Creative Furnishing*:

Further, in presenting affidavit evidence to establish the necessary ingredients for an *ex parte* order for a Mareva injunction, it is incumbent on the applicant to make frank and full disclosure of all material facts. Every material representation must not be misleading, and there must not be any suppression of material facts. Failure to do so at the crucial time of making the *ex parte* application would invariably be fatal.

[46] On a review of the facts, evidence and law on the matter, this court agrees that the plaintiffs did overstate its case for a *Mareva* injunction. The plaintiffs presumed the fact of ownership of all the cargo identified in the *ex parte* order as the defendant's without drawing the court's attention to the speculative basis for that presumption.

[47] In so doing, the plaintiffs failed to make full and frank disclosure to the court that bills of lading were inconclusive and there may be multiple ownership claims to the cargo in question. The plaintiffs' own experience with the defendant under the contracts in dispute in this action did not prove the *modus operandi* of the defendant of pretending to ship cargo with no intention to transfer property in it to defraud buyers.

[48] For the above reasons, this court finds that the *Mareva* injunction in the *ex parte* order was wrongly granted on the premise of a presumption that was not called to the court's attention.

Cargo Located Outside The Jurisdiction

[49] Based on the evidence produced in support of the *ex parte* order, the overseas cargo under Shipment Nos. 224161401,224275340 and 223785243 were being shipped from Antwerp to Ningbo, China. According to Maersk, these containers had been sent back to the port of origin in Antwerp, Belgium.

[50] This point did not appear to be disputed by the plaintiffs. In other words, it was asserted that the overseas cargo under these three shipments were assets of the defendant in the jurisdiction of the court when this was clearly not the case. Based on this, the *Mareva* injunction in the *ex parte* order should not have been granted in respect of those containers.

Cargo Not The Subject Matter Of Litigation

[51] It was a further substantive objection by Maersk to the *ex parte* order that as per paras. (2) and (3) of the *ex parte* order, the plaintiffs had sought and obtained the orders to detain, preserve and take samples from all the 32 containers listed in the *ex parte* order. They were granted pursuant to the following provisions in O. 29 of the Rules of Court 2012:

> **2. Detention, preservation of subject matter of cause or matter (O. 29 r. 2)**
>
> (1) On the application of any party to a cause or matter, the Court may make an order for the detention, custody or preservation of **any property which is the subject matter of the cause or matter,** or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.
>
> **3. Power to order samples to be taken (O. 29 r. 3)**
>
> (1) Where the Court considers it necessary or expedient for the purpose of obtaining full information or evidence in any cause or matter, the Court may, on the application of a party to the cause or matter, and on such terms, if any, as it thinks just, by order authorize or require –
>
> (a) any sample to be taken of **any property which is the subject matter of the cause** or matter or as to which any question may arise therein;
> ... (emphasis added)

[52] This point was also not seriously contested by the plaintiffs. It appeared to be common ground that the detained cargo were not, in fact, the subject matter of the action against the defendant. The plaintiffs' claim is for breach of sale contracts relating to cargo in ten containers shipped on the same vessel under CMA CGM Bill of Lading No. HBG1708173E and CMA CGM Waybill No. HBG1708173D on 22 December 2022 from Hamburg to Port Klang.

[53] Thus, the cargo identified in the *ex parte* order was unrelated to the sale contracts under dispute in this action. They were simply assets sought by the plaintiffs to be secured to satisfy a prospective judgment in this action, by preventing them from being removed from the jurisdiction. As such, there was no proper basis to invoke O. 29 rr. 2 and 3 of the Rules of Court 2012 to obtain paras. (2) and (3) of the *ex parte* order.

[54] In the final analysis, this court finds that the *ex parte* order should not have been granted in the first place.

[55] This decision is not a reflection of this court's views on the validity of the plaintiffs' complaint against the defendant, but to underscore the standards to be met when moving the court for *ex parte* interim injunctions, especially when third party rights may be adversely affected.

[56] This court adopts the views expressed in *Galaxia Maritime SA v. Mineral Importexport; The Eleftherios* [1982] 1 All ER 796 ("*Galaxia Maritime*"). The Court of Appeal discharged a *Mareva* injunction which restrained a cargo of coal loaded on a vessel belonging to another shipowner which was at port as an "unwarrantable act of interference with the business of the third party, the shipowner."

[57] In *Galaxia Maritime*, the Court of Appeal held that the rights of a third party in certain situations must prevail over the plaintiff's desire to secure the defendant's assets for himself against the day of judgment and the mere proffering of an indemnity in whatever form does not displace that balance.

[58] For all of the above reasons, the *ex parte* order is set aside and an order for assessment of damages suffered by Maersk by reason of the *ex parte* order is allowed.

Assessment Of Damages

[59] According to Maersk, the *ex parte* order interfered with Maersk's rights and obligations under the disputed B/Ls. But for the *ex parte* order, Maersk contended that it would have exercised its rights as a carrier to deal with the detained cargo, including to return them or otherwise dispose of them. Instead, Maersk claims to have suffered damages in the sum of RM384,878.38 comprising the following components:

(i) RM113,160 charged by Northport being daily storage/detention costs for the 23 containers detained from 16 February 2023 until 3 May 2023;

(ii) RM261,302.38 being legal costs incurred for advice and assistance that Maersk required upon being served with the *ex parte* order; and

(iii) RM10,416 being the survey fees to Links Survey (M) Sdn Bhd incurred in respect of the *ex parte* order and consent order.

[60] In response, the plaintiffs submitted that there is no direct causal link between the *ex parte* order and the damages claimed since the *ex parte* order lapsed on 9 March 2023. I deal with each of the heads of loss below.

Survey Of The Detained Cargo

[61] Maersk had on 4 April 2023 filed encl. 29 with various prayers and on 6 April 2023, the plaintiffs consented to prayer 6 in these terms ("consent order"):

A

> 6. Bahawa tanpa prejudis kepada Permohonan (4) dan (5) di atas, sementara menunggu pelupusan Permohonan ini, Pencelah Dicadangkan tersebut dibenarkan untuk memeriksa kandungan kontena yang disenaraikan di bawah Perenggan (1) Perintah *Ex-parte* dan mengambil semua langkah yang perlu untuk memastikan sifat kandungan tersebut untuk penentuan adil dan berkesan bagi semua isu yang timbul daripada dan/atau berkaitan dengan pelepasan yang diberikan dalam Perintah *Ex-parte*, dan kosnya dianggap sebagai sebahagian daripada kos Permohonan ini;

B

[62] The survey which was the subject of the consent order was carried out and completed on 27 April 2023 and 3 May 2023 ("survey"). As the parties C had agreed that Maersk's costs to carry out the survey would form part of the costs of encl. 29, I disallow the claim for RM10,416 as damages.

[63] Based on the terms of the consent order, the intention of the parties appears to be that all costs associated with the survey would constitute an out-of-pocket disbursement recoverable as part of the costs of encl. 29.

D

[64] Costs of encl. 29 was eventually decided on 19 September 2023 as costs in the cause.

Storage Charges

E

[65] I allow this claim from 20 February 2023 to 6 April 2023.

[66] There is no basis for the claim for storage charges between 16 February 2023 and 20 February 2023 because the detained cargo was already discharged on 2 February 2023 at the port quite independently of the *ex parte* order. The period terminates on 6 April 2023 because Maersk was F at that point, entirely at liberty to disregard the *ex parte* order.

[67] More importantly, I disallow storage charges for the detained cargo for the period between 6 April 2023 and 3 May 2023 because these charges were necessitated by the consent order, and not the *ex parte* order. They are, in this court's view, sufficiently connected to the costs of the survey to be G regarded as part of the contemplated out-of-pocket disbursements associated with the survey.

Intervener's Legal Fees

[68] I disallow the claim for legal fees as damages based on *Golden Star* H *& Ors v. Ling Peek Hoe & Anor And Anorther Appeal* [2024] 6 CLJ 487 where the Federal Court has drawn a clear distinction between costs recoverable in litigation and damages:

> [25] There is in place in our system of civil justice a fairly elaborate costs regime. ...

I

> [26] The term "costs" is not defined in Act 91 but it is defined in the Rules of Court 2012. Order 59 r. 1 defines "costs" "includes fees, charges, disbursements, expenses and remuneration". From the evidence led before the High Court, it is apparent that the respondents were claiming

> as special damages, fees, charges, disbursements, expenses and remuneration as well as the refresher and retainer fees that they had to pay their lawyers in maintaining the action against the appellants. We are in no doubt that these claims fall well within the terms of the costs order of 28 November 2012 and it was not open to the respondents to ignore that order. These claims were also claimable as costs in O. 59, and were thus not claimable as damages.

[69] Based on a review of the bills of Messrs Joseph & Partners produced in Maersk's affidavit, this court finds that charges were incurred almost exclusively in connection with this litigation. The work commenced on 24 February 2023 included attending to communications with the plaintiffs' solicitors, reviewing and drawing up court papers and attending these court proceedings and generally, advice and getting up for the filing of an application to set aside the *ex parte* order. There is no doubt that they fall within the meaning of costs and are only recoverable as such in these legal proceedings.

Intervener's Costs In The Proceedings

[70] I award the costs of encl. 48 to Maersk on an indemnity basis based on the rationale in *Project Development Co Ltd SA v. KMK Securities Ltd* [1983] 1 All ER 465 *ie*,:

> since innocent third parties are entitled to expenses against plaintiffs incurred as a result of complying with *Mareva* injunctions, it followed that the intervener should be indemnified for the expenses it had incurred in successfully applying to vary the order by permitting the intervener to recover all the costs in established as being reasonable; that, accordingly, an order would be made that the intervener's costs were to be taxed in accordance with R.S.C., Ord. 62 r. 29 on a solicitor and own client basis but with a direction that, notwithstanding the terms of rule 29(1), it was for the intervener to establish that the costs had been reasonably incurred and were reasonable In amount.

[71] Pursuant to O. 59 r. 16(4) of the Rules of Court 2012, all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred.

[72] Subject to confirmation of the parties that all proceedings in this action have concluded as between the plaintiffs and Maersk as intervener with the delivery of this decision, I direct parties to file their costs submissions in respect of encl. 48 and separately, all other costs orders made todate as between the plaintiffs and Maersk, on an indemnity basis. I should not need to express that only costs related to this litigation are to be accounted for.

[73] Costs submissions are to be filed within three weeks unless the parties can sooner agree on the quantum of costs payable to be recorded.